

MINUTES
FRIDAY – MARCH 28, 2003

Call to Order

The Board of Environmental Review's regularly scheduled meeting was called to order by Chairman Russell at 9:07 a.m., on Friday, March 28, 2003, in Room 111 of the Metcalf Building, 1520 East Sixth Avenue, Helena, Montana.

Attendance

Board Members Present: Chairman Joseph Russell, Susan Kirby Brooke, David Fishbaugh, Kim Lacey, Dr. Garon Smith, Ward Shanahan, and Russ Hudson (via telephone)

Board Members Absent: none

Board Attorneys Present: Tom Bowe and Kelly O'Sullivan, Attorney General's Office, Department of Justice

Board Secretary Present: Joyce Wittenberg

Court Reporter Present: Laurie Crutcher for Hendrickson Court Reporting

Department Personnel Present: Jan Sensibaugh, Director; Tom Livers, Deputy Director; Lisa Peterson, Public Affairs Coordinator, Director's Office (DIR); Tom Ellerhoff, DIR; John North, Chief Legal Counsel, Legal Unit (Legal), DIR; Claudia Massman, Legal, DIR; Jolyn Eggart, Legal, DIR; Ed Hayes, Legal, DIR; David Rusoff, Legal, DIR; Keith Christie, Legal, DIR; Steve Welch, Administrator, Permitting & Compliance Division (PCD); Judy Hanson, PCD; Don Vidrine, Chief, Air & Waste Management Bureau (AWMB), PCD; Dave Klemp, AWMB, PCD; Vickie Walsh, AWMB, PCD; Charles Homer, AWMB, PCD; Jan Brown, AWMB, PCD; Eric Merchant, AWMB, PCD; Bonnie Lovelace, Chief, Water Protection Bureau (WPB), PCD; Jon Dilliard, Chief, Community Services Bureau (CSB), PCD; Eugene Pizzini, CSB, PCD; John Arrigo, Administrator, Enforcement Division (ENF); Frank Gessamn, ENF; Art Compton, Administrator, Planning, Prevention & Assistance Division (PPAD); Abe Horpestad, Resource Protection Bureau (RPB), PPAD; Chris Levine, RPB, PPAD; Debra Wolfe, RPB, PPAD; Jeff Blend, RPB, PPAD; Mike Suplee, RPB, PPAD; John Coefield, Monitoring and Data Management Bureau, PPAD

Interested Persons Present (*Disclaimer: Names are spelled as best they can be read from the official sign-in sheet.*): Rex Mongold, Tongue River Farmer; Harmon Ranney, Montana Coalbed Natural Gas Alliance; Roger Muggli, Tongue & Yellowstone Irrigation District (T&Y); Sherri Bruhn, Northern Plains Resource Council (NPRC); Amy Fryckman, NPRC; Nicole Prevost Reisner, NPRC; Michael Reisner, NPRC; Alan Joscelyn, Fidelity Exploration (Fidelity); Bruce Williams, Fidelity; Joe Icenoggle, Fidelity; Duane Zimmerman, Nance Petroleum; Dave Searle, Marathon Oil Company; Jon Metropoulis,

Fidelity; Art Hayes, Jr., Tongue River Water Users Association (TRWUA); Clint McRae, Rocker Six Cattle; Roger P., Energy Labs; Veronica Small-Eastman, Crow/Northern Cheyenne Tribe; Gary Amestoy, Amestoy Consulting; Gail Small, Northern Cheyenne; Sara Stanton, Roundup Power; Dan Hoven, Roundup Power; Ron Steg, EPA; Frank Smith, Fort Peck; Julie Dalsoglio, EPA; Lee Macholz, self; Dave Feldman, Arkansas DEQ; Joe Walksalong, Jr., Northern Cheyenne; Don Skaar, MT Fish, Wildlife and Parks; Brenda Lindlief Hall, TRWUA; Charlie Gephart, T&Y; Ray Muggli, TRWUA; Bill Griffin, Powder River Water User; Marilyn Krause, Bureau Of Land Management; Norma Bixby, House District 5; James Jensen, Montana Environmental Information Center; Steve Gilbert, self

Agenda

I. ADMINISTRATIVE ITEMS

A. Review and Approve Minutes

1. Review and approve minutes of January 31, 2003 meeting.

Chairman Russell introduced the item. Dr. Smith MOVED to APPROVE the minutes of the January 31, 2003 meeting. The motion was SECONDED. A VOTE was taken and the motion CARRIED unanimously.

2. Review and approve minutes of January 31, 2003 numeric standards rulemaking hearing.

Chairman Russell introduced the item. Ms. Lacey MOVED to APPROVE the minutes. Mr. Shanahan SECONDED the motion. A VOTE was taken and the motion CARRIED unanimously.

I. BRIEFING AGENDA ITEMS

A. CONTESTED CASE UPDATE

1. Cases assigned to Hearing Officer Kelly O'Sullivan

- a. Town of Geraldine's MPDES Permit No. MT-002-0826

Ms. O'Sullivan explained that nothing had changed in this case since the last Board Meeting and that the parties still anticipate that this will be a fairly lengthy case.

- b. Classical Gas, BER 2002-12 UST

Ms. O'Sullivan explained that the Department moved for summary judgment and that Classical Gas had agreed to the entry of summary judgment against it and a penalty of \$500. Her recommendation to the Board was to sign the order that would be presented in the action section of the agenda.

2. Cases assigned to Hearing Officer Tom Bowe

- a. M&W Investments, Inc., EQ #01-1457 and #00-1822

Mr. Bowe explained that this was the case where the parties had agreed last summer to delay the proceedings so that an additional year of monitoring could be obtained.

- b. Van Dyke Construction Company, Inc. and Loughmiller Reclamation, L.L.C., BER 2002-07 OC

Mr. Bowe stated that settlement negotiations had been taking place and that it was expected that a settlement agreement and order for dismissal would be ready for the June meeting.

- c. CR Kendall Corporation, BER 2002-09 MM

Mr. Bowe explained that he had agreed to delay issuing a scheduling order because both parties had agreed to delay.

- d. Sterling Mining Company's Air Quality Permit No. 2414-01, BER 2002-01 AQ

Mr. Bowe said it was his understanding that a settlement had been reached, but that it did not affect the constitutional or MEPA claims.

- e. Westmoreland Resources, Inc., BER 2002-04 MSUMRA

Mr. Bowe informed the Board that the case had been settled and that an order for dismissal would be presented as an action item.

- f. Derek Brown Construction, Inc., BER 2002-10 ASB

Mr. Bowe stated that the construction company had sought to add additional parties to the case, but that he had issued a proposed decision recommending denial of that motion. He reported that no exceptions were filed; therefore, it would be appropriate for the Board to approve the proposed decision. Mr. Bowe said DEQ had filed a motion for partial summary judgment and that the hearing was scheduled for May.

- g. Northern Line Layers, Inc., BER 2002-13 OC

Mr. Bowe explained that settlement negotiations were ongoing and that a settlement was expected by the June meeting.

- h. ExxonMobil Refining & Supply Co., BER 2003-01 WQ

Mr. Bowe said he had issued an order setting an April 21 deadline for submittal of proposed schedules.

III. ACTION AGENDA ITEMS

A. REPEAL, AMENDMENT OR ADOPTION OF FINAL RULES

1. In the matter of the amendment of ARM 17.8.101, 17.8.102, 17.8.103, 17.8.106, 17.8.110, 17.8.302, 17.8.401, 17.8.402, 17.8.801, 17.8.802, 17.8.818, 17.8.819, 17.8.821, 17.8.901, 17.8.902, 17.8.905, 17.8.1002, 17.8.1201, 17.8.1202, 17.8.1204, 17.8.1206, 17.8.1212, 17.8.1213, 17.8.1214, 17.8.1220, 17.8.1224, 17.8.1226, and 17.8.1232 pertaining to definitions and incorporation by reference of current federal regulations and other materials into air quality rules.

Mr. Bowe said he was the presiding officer and that his report was in the Board packet. He explained that these were a series of amendments to rules pertaining to air quality. He stated there had been some comments from the EPA, some of which he had addressed in his report. He also said that some of the EPA comments were about stack height, but that the amendments didn't address stack height.

Mr. Bowe concurred with Dr. Smith's suggestion that it would be beneficial for the Department to look at the EPA's comments about stack height to see if future rulemaking might be indicated. Mr. Bowe recommended the Board adopt the rulemaking as proposed.

Chairman Russell called for a motion to ADOPT the final rules and to ACCEPT the presiding officer's report with the comments and responses, and the 521 and 311 analyses. Mr. Shanahan so MOVED. Ms. Lacey SECONDED the motion. A VOTE was taken and the motion CARRIED unanimously.

2. In the matter of the adoption of New Rules I through IV, pertaining to standards for electrical conductivity and sodium adsorption ratio and classifications for constructed coal bed methane water holding ponds, and the amendment of ARM 17.30.602, 17.30.706 and 17.30.715 pertaining to definitions for water quality standards, informational requirements for nondegradation significance/ authorization review and nonsignificance criteria.

Chairman Russell introduced the agenda item and stated that the Board was sure to have questions. He requested that responses be deliberate and that responders stick to what was asked of them.

Mr. Bowe explained that this was the rulemaking process where the Board conducted the hearings, so there wasn't a presiding officer report. He referred to the Board Decision Document, which the Department had prepared and included in the Board packet.

Mr. Compton, on behalf of the Department, explained that the decision document Mr. Bowe referenced had been prepared in response to the Board's request for a tool to help them with the individual decisions that had to be made. He explained that the first table had the implementation measures, the second had the values for the irrigation season and the third had the values for the non-irrigation season.

Mr. Compton said they had made two modest changes in the response to public comments. The first change was to provide the option of adopting a year-round water quality standard for the Tongue River Reservoir. The second change was to provide a set of maximum instantaneous values to go along with the monthly average values.

After a brief discussion, Board members agreed to address the standards first. Mr. Bowe pointed out that the Department had prepared graphs of the values of EC and SAR for the different waters, so the Board could compare the proposed standards with the actual range of ambient values.

Dr. Smith said it was clear from documentation that conditions change dramatically on a daily basis in some of the areas. He said he was in favor of using both a 30-day average and some sort of instantaneous maximum. Mr. Compton confirmed that the data compiled was about 30-40 years' worth. Dr. Smith observed that the range of flows was skewed and was not a bell-shaped curve. He opined that it was appropriate to use percentiles instead of standard deviations in setting standards with this kind of data distribution. He cautioned the Board against setting a standard so low that too many excursions above that level would happen with natural occurrences alone.

Mr. Hudson inquired about the date range of the data and whether any of Wyoming's discharges had influence on this data set in recent years. Mr. Horpestad said the data was extracted from the USGS data records and that it included all data from 30 or 40 years ago up to

six months ago. He explained that it would be difficult to do a trend analysis on the data. He also stated he had no indication that there were increases caused by Wyoming activities.

Dr. Smith MOVED to ADOPT an EC standard of 2000 for the irrigation season on the Powder River. Ms. Brooke SECONDED the motion. Ms. Lacey engaged a brief discussion on the relationship between the chosen standard and the size of the holding ponds. A VOTE was taken and the motion CARRIED 6-1.

Chairman Russell called for a motion to ADOPT an EC standard of 2000 for the Little Powder River during the irrigation season. Mr. Shanahan so MOVED. Ms. Brooke SECONDED the motion. The motion CARRIED with a 6-1 VOTE.

Chairman Russell explained that the Department was recommending an EC standard of 1000 on the Tongue River during the irrigation season. Dr. Smith inquired as to how many irrigators actually take water out of the reach below the diversion to irrigate. Mr. Art Hayes, President of the Tongue River Water Users, said they have two contract holders that take water below the diversion, but that it's not a constant thing.

Mr. Hudson asked if there would be any dischargers in the lower Tongue River. Dr. Smith thought there weren't any potential coal bed methane (CBM) dischargers, but that irrigation recapture could be considered a contribution.

Mr. Fishbaugh asked if it was within the scope of rulemaking to change the point of compliance. Dr. Smith asked if it would be possible to set the standard at the T&Y Irrigation Ditch. Mr. Compton stated that when the allocation scheme was looked at last year, they ran into problems with the possibility of having numbers more stringent than those necessary to protect beneficial uses. He suggested that a TMDL target at that location would be one way to do it.

Mr. Roger Muggli, T&Y Irrigation District, said there are 20 miles of river below the diversion. He explained that there wasn't a reservoir or an effective pool at the dam. He said the Golf Course was the only major user after Miles City. Mr. Muggli informed the Board of the presence of significant aquatic life. He recommended leaving the measuring device where it is.

Mr. Bowe said that the rulemaking that allocated assimilative capacity expired in February; therefore, identifying a site-specific locale on the river would be beyond the scope of this rulemaking. He indicated that the Board could consider what impact an EC of 1000 in the Tongue River at Miles City would have upstream from there.

Dr. Smith MOVED to ADOPT an EC standard of 1000 for the Tongue River at Miles City during the irrigation season. Ms. Lacey SECONDED the motion. The motion CARRIED with a 5-2 VOTE.

Chairman Russell said the Department was recommending an EC standard of 1000 for Rosebud Creek during the irrigation season. Dr. Smith MOVED to ADOPT an EC standard of 1000 for Rosebud Creek during the irrigation season. Ms. Brooke SECONDED the motion. The motion CARRIED with a unanimous VOTE.

Chairman Russell reiterated the Department's recommendation of an EC standard of 500 on all tributaries. Mr. Fishbaugh questioned the low number. Mr. Compton said it was the recommendation of the Department's consultant, Dr. Oster, and provided a brief explanation of how the recommendation was reached. The number is low because the leaching fraction is

essentially zero on spreader dike alfalfa fields. The low number is needed to protect beneficial uses.

Mr. Horpestad confirmed that the irrigation season referred to was from March 2 through October 31. Mr. Hayes added that his first irrigation this year was the last week of January. Discussion continued regarding the standard of 500 on the tributaries and the flows through them.

Dr. Smith MOVED for the Board to ADOPT an EC standard of 500 for the tributaries during the irrigation season. Ms. Lacey SECONDED the motion. A VOTE was taken and the motion CARRIED unanimously.

Chairman Russell explained that the next issue to be dealt with was whether to adopt a "maximum" standard. A lengthy discussion commenced concerning the definition and purpose of a "maximum" standard.

Dr. Smith MOVED to ADOPT a maximum EC standard for the irrigation season, and to ADOPT all five of the Department's recommendations (2500 on the Powder and the Little Powder Rivers, 1500 on the Tongue River and Rosebud Creek, and 500 for all tributaries. Mr. Hudson SECONDED the motion. Discussion continued regarding the concept of maximum standards. The motion CARRIED with a unanimous VOTE.

Discussion commenced regarding the location of Morehead versus Locate. In-depth discussion took place concerning SARs, data and monitoring. Dr. Smith MOVED to ADOPT an SAR of 4.5 on the Powder River during the irrigation season. Ms. Lacey SECONDED the motion.

Mr. Hudson said he felt that the Department's recommendations were slightly higher than what he would like to see. He also asked how the standards would be implemented and monitored. After a lengthy discussion regarding implementation and MPDES permits, Mr. Hudson stated that he felt 4.5 was still a little high and that he would prefer 4.0. Dr. Smith made an AMENDED motion to ADOPT an SAR of 4.0 on the Powder River during the irrigation season. Ms. Lacey SECONDED the amended motion.

Mr. Fishbaugh initiated further discussion regarding the basis for the values chosen. Mr. Compton explained that the Department's numbers were driven by EC. Chairman Russell called for a VOTE and the motion CARRIED 4-3.

Dr. Smith said he felt that the Little Powder River was quite a bit more impaired and MOVED to ADOPT an SAR of 5.0 during the irrigation season. Mr. Shanahan SECONDED the motion. The motion CARRIED with a unanimous VOTE.

Dr. Smith thought the Department recommendation of 3.5 for the Tongue River was too high and MOVED to ADOPT an SAR of 2.5 for the irrigation season. Mr. Hudson SECONDED the motion. Ms. Brooke noted that the Irrigator's compromise was an SAR of 3.0.

Mr. Muggli provided years of data on the SAR of his irrigation water and the SAR of soil in one of his fields. A brief discussion took place concerning the Northern Cheyenne Tribe's SAR standards.

Chairman Russell reminded the Board of the motion on the floor, which had been seconded. The motion FAILED with a 4-3 VOTE.

Dr. Smith MOVED to ADOPT an SAR of 3.0 on the Tongue River for the irrigation season. Ms. Lacey SECONDED the motion. The motion CARRIED with a 6-1 VOTE.

Chairman Russell stated the Department's recommendation of a 3.5 SAR for Rosebud Creek during the irrigation season. Ms. Lacey MOVED to ADOPT an SAR of 3.0 for Rosebud Creek during the irrigation season. Dr. Smith SECONDED the motion. The motion CARRIED with a unanimous VOTE.

Mr. Horpestad provided explanation of the Department's basis for recommending an SAR of 5.0 for all tributaries during the irrigation season. Dr. Smith MOVED to ADOPT an SAR of 3.0 for all tributaries during the irrigation season. Ms. Brooke SECONDED the motion. The motion CARRIED with a 6-1 VOTE.

Chairman Russell called for a motion to ADOPT maximum standards for SAR during the irrigation season. Mr. Shanahan so MOVED. Ms. Brooke SECONDED the motion. The motion CARRIED with a unanimous VOTE.

Dr. Smith MOVED to ADOPT maximum standards for SAR during the irrigation season at 6.0 for the Powder River, 7.5 for the Little Powder River, 4.5 for the Tongue River, 4.5 for Rosebud Creek, and 4.5 for all tributaries. Mr. Hudson SECONDED the motion. The motion CARRIED with a unanimous VOTE.

Moving on to the non-irrigation season, Ms. Lacey MOVED to ADOPT an EC of 2500 for the Powder River. Dr. Smith SECONDED the motion. The motion CARRIED with a unanimous VOTE.

Mr. Fishbaugh MOVED to ADOPT an EC standard of 2500 for the Little Powder River during the non-irrigation season. Ms. Brooke SECONDED the motion. The motion CARRIED with a unanimous VOTE.

Ms. Lacey MOVED to ADOPT an EC standard of 1500 for the Tongue River during the non-irrigation season. Mr. Hudson inquired about the upcoming decision for the Tongue irrigation season to be year-round and a lengthy discussion took place. It was decided that this issue should be addressed first and Ms. Lacey WITHDREW her motion.

Dr. Smith MOVED to ADOPT the Tongue River irrigation season standards for the Tongue River Reservoir year-round (1000 EC, 1500 maximum EC, 3.0 SAR, and 4.5 maximum SAR). Ms. Brooke SECONDED the motion. The motion CARRIED with a unanimous VOTE.

Ms. Lacey MOVED to ADOPT an EC of 1500 for the Tongue River during the non-irrigation season. Dr. Smith SECONDED the motion. The motion CARRIED with a 4-3 VOTE.

Ms. Lacey MOVED to ADOPT an EC of 1500 for Rosebud Creek for the non-irrigation season. Dr. Smith SECONDED the motion. The motion FAILED with a 4-3 VOTE.

Mr. Fishbaugh MOVED to ADOPT an EC of 2000 for Rosebud Creek during the non-irrigation season. Mr. Shanahan SECONDED the motion. Mr. Clint McRae suggested that the Board take another look at the EC for the non-irrigation season because there isn't a non-irrigation season on the Rosebud Creek. Brief discussion took place regarding the issue. With a 4-3 VOTE, the motion CARRIED.

Dr. Smith MOVED to ADOPT an EC of 500 for all tributaries during the non-irrigation season. Mr. Shanahan SECONDED the motion. The motion CARRIED with a unanimous VOTE.

Mr. Fishbaugh MOVED to ADOPT maximum EC standards for the non-irrigation season and to ADOPT the five Department-recommended values of 2500 for the Powder River, Little Powder River, Tongue River and Rosebud Creek, and 500 for all tributaries. Mr. Shanahan SECONDED the motion. The motion CARRIED with a unanimous VOTE.

Regarding SAR for the non-irrigation season, Mr. Hudson said he again thought the numbers recommended by the Department were too high, and MOVED to ADOPT an SAR of 6.0 for the Powder River, 6.0 for the Little Powder River, 3.0 for the Tongue River, 3.0 for Rosebud Creek, and 4.0 for all tributaries.

After some discussion, it was decided to take each water body individually. Mr. Hudson MOVED to ADOPT an SAR of 6.0 for the Powder River during the non-irrigation season. Dr. Smith SECONDED the motion. Discussion commenced concerning the effects of SAR on soil and on banks during various flows. Also discussed was whether discharge during the winter months would be more restricted by nondegradation provisions for flow or by EC and SAR levels. Chairman Russell called for a VOTE and the motion CARRIED 4-3.

Mr. Fishbaugh MOVED to ADOPT an SAR of 7.5 for the Little Powder River during the non-irrigation season. Mr. Shanahan SECONDED the motion. The motion FAILED with a 4-3 VOTE.

Mr. Shanahan MOVED to ADOPT an SAR of 7.0 for the Little Powder River during the non-irrigation season. Mr. Fishbaugh SECONDED the motion. The motion FAILED with a 4-3 VOTE.

Mr. Hudson MOVED to ADOPT an SAR of 6.5 for the Little Powder River during the non-irrigation season. Dr. Smith SECONDED the motion. The motion CARRIED with a unanimous VOTE.

Mr. Shanahan MOVED to ADOPT an SAR of 5.0 for the Tongue River during the non-irrigation season. Mr. Fishbaugh SECONDED the motion. The motion CARRIED with a 6-1 VOTE.

Mr. Shanahan MOVED to ADOPT an SAR of 5.0 for Rosebud Creek during the non-irrigation season. Mr. Fishbaugh SECONDED the motion. The motion CARRIED with a 5-2 VOTE.

Dr. Smith MOVED to ADOPT an SAR of 5.0 for all tributaries during the non-irrigation season. Mr. Shanahan SECONDED the motion. The motion CARRIED with a unanimous VOTE.

Mr. Shanahan MOVED to ADOPT a maximum SAR standard for the non-irrigation season. Ms. Lacey SECONDED the motion. The motion CARRIED with a unanimous VOTE.

Ms. Brooke MOVED that the Board ADOPT 50 percent over the standard for the maximum SAR: 9.0 for the Powder River, 9.75 for the Little Powder River, 7.5 for the Tongue River, 7.5 for Rosebud Creek, and 7.5 for all tributaries during the non-irrigation season. Ms. Lacey SECONDED the motion. The motion CARRIED with a unanimous VOTE.

The meeting was in recess for lunch from about 12:20 until 1:00 p.m.

Chairman Russell explained that they would now address the general rules of the decision-making process and that the first issue was to adopt a flow-based rule. Mr. Compton explained that the flow-based rule subsection would simply direct the Department to use either monthly flows or a range of flows in calculating the amount of allowable discharge. He also confirmed that there were a couple of permits in place that use some flow-based protocols.

Mr. Shanahan MOVED to ADOPT the flow-based rule subsection. Mr. Fishbaugh SECONDED the motion. Dr. Smith asked the Department to respond to some EPA concerns about the protectiveness afforded by the flow-based approach because it hadn't been spelled out in much detail in the rules. Mr. Hudson suggested that the flow-based is more difficult to administer than other systems. Mr. Compton responded in detail to the concern.

Conversation commenced regarding how the adoption of maximum levels played into the permit writing and how the enforcement would work when limits are exceeded. Also discussed were how frequently industry would monitor and what the reporting periods to DEQ would be. Brief dialogue took place regarding the difference between the flow-based and the 7Q10 approaches.

Discussion continued regarding the proposed language of "monthly flows or range of monthly flows." Mr. Bruce Williams suggested that at different flows, different amounts of CBM water could be discharged. The TMDL process was also discussed. Mr. Hayes was skeptical of the flow-based permitting, stating he had serious questions about it.

Chairman Russell called for a VOTE and the motion CARRIED 6-1.

Mr. Compton refreshed the Board on the nondegradation nonsignificance rule subsection. He said the Department was proposing that the nondegradation threshold for EC and SAR remain at the narrative nondeg threshold, which is the same as the standard. A problem with a threshold at 50% of the standard is that the streams are naturally often above that. He said that we can protect high-quality water and beneficial uses with the narrative nondeg threshold.

Dr. Smith noted the great variability in natural water quality. He suggested that, from his role on the Board of trying to protect water quality, the best thing to focus on would be a long-term average value, such as a 10-year rolling average, which would help assess whether there were long-term changes in water quality. He also said that he thought initiating rulemaking for a different method might be a good choice.

Dr. Smith MOVED to ADOPT the nondegradation nonsignificance rule subsection and to direct the Department to put together a rule for a different method. Mr. Hudson SECONDED the motion. The motion CARRIED with a unanimous VOTE.

Mr. Fishbaugh MOVED to ADOPT a mandatory significance determination rule subsection. Mr. Shanahan SECONDED the motion. Mr. Compton said this was the tool that would be used in lieu of a permit to demonstrate that there would be no significant change in water quality as a result of the producer's water management plan. Under the federal court decision a permit was not required, but it was still necessary to meet water quality and nondeg standards. The motion CARRIED with a unanimous VOTE.

Discussion commenced in regard to adopting the new classification for CBM discharge water ponds and the associated water quality standards. Chairman Russell called for a motion to ADOPT a new classification and to adopt 3000 as the numeric standard in that water. Ms. Brooke so MOVED. Mr. Shanahan SECONDED the motion. The motion CARRIED with a unanimous VOTE.

Mr. Shanahan MOVED to ADOPT the nonseverability rule subsection. Mr. Fishbaugh SECONDED the motion. Discussion commenced concerning what the nonseverability would mean and whether the rule could be implemented if another part of the rule was challenged and thrown out. Discussion continued regarding severability versus nonseverability and also regarding TMDLs. The motion CARRIED with a unanimous VOTE. Ms. Lacey requested periodic updates concerning the numeric standards and CBM development and monitoring.

Mr. Bowe informed the Board that they had duplicated their vote with regard to adopting the nondegradation nonsignificance rule. He explained that the outcome would be a rule that adopted nondegradation nonsignificance, and a subsection in Alternative 2 of New Rule IV also adopted nondegradation nonsignificance. He said the one that should be adopted was the language in Alternative 2 of New Rule IV. Mr. Shanahan so MOVED. Mr. Fishbaugh SECONDED the motion. The motion CARRIED with a unanimous VOTE.

Mr. Bowe said that it would take some time to prepare the notice of adoption and amendment. He suggested that it might be appropriate for the Board to schedule a public meeting, which could be a teleconference, where the Board could vote to adopt the notice of adoption and amendment after reviewing the revised notice. Mr. Bowe recommended having the teleconference on April 11. Chairman Russell suggested 10:30 a.m. Mr. Livers indicated a target mailing date of April 4.

B. INITIATION OF RULEMAKING AND APPOINTMENT OF HEARING OFFICER

1. In the matter of the amendment of ARM 17.38.101, 17.38.201A, 17.38.202, 17.38.203, 17.38.206, 17.38.208, 17.38.216, 17.38.229, 17.38.239, 17.38.249 and 17.38.302, and the adoption of new rule I pertaining to public water supply.

Mr. John Dilliard said this was a proposal to adopt new federal requirements and amend existing rules within the public water supply rules. He explained that Rule 17.38.203 was a proposal to adopt new arsenic standards for drinking water and explained how this rulemaking was different from the arsenic rule that was withdrawn at a previous meeting.

Mr. Dilliard referred the Board to Rule 17.38.216, saying the proposal of this rule was to modify the sampling and compliance determination methods for inorganic chemicals. He said that while it may appear that the new number is less stringent than the EPA number, it is what the EPA had actually intended.

Mr. Dilliard said New Rule I was a proposal to adopt the Department Circular PWS5, which establishes the method to identify ground water under the direct influence of surface waters. He said that the Board had approved this circular several years ago, but that it had not been officially incorporated into the rules.

Mr. Shanahan MOVED to INITIATE the rulemaking and to APPOINT Kelly O'Sullivan as the Presiding Officer. Ms. Brooke SECONDED the motion. The motion CARRIED with a unanimous VOTE.

C. NEW CONTESTED CASES

Mr. Bowe said there were four new contested cases, but the first two had been settled.

1. In the matter of the Modification of the Air Quality Permits of Malmstrom Air Force Base (Permit Nos. 1427-05, 1427-06) (BER 2003-02 AQ).

Mr. Bowe said a settlement agreement and order for dismissal would be presented later in the agenda.

2. In the matter of McHugh Mobile Home Partnership's (BER 2003-03 PWS) request for hearing to appeal a Notice of Violation and Administrative Compliance and Penalty Order issued by DEQ.

Mr. Bowe stated that this would be on the action agenda for dismissal.

3. In the matter of the appeal of the issuance of the Air Quality Permit for the Roundup Power Project, Permit No. 3182-00 (BER 2003-04 AQ).

Mr. Bowe said the parties had not agreed on a scheduling order and that, while the original parties were DEQ and the petitioners, the owner of the Roundup Power Project (permit applicant) had moved to intervene and he had granted that motion. He said the permit applicant requested a hearing before the Board in early June, but that the petitioners and DEQ proposed later dates for a hearing, so he had issued a partial scheduling order.

Mr. Bowe said the Board needed to decide whether they would hear the case, or have a hearing examiner hear it. He said they also needed to decide on a hearing date, since the parties are not in agreement on a hearing date. He reminded the Board that they had set a goal with respect to air quality permit appeals, to hold the hearing within 120 days of receiving the petition for hearing. Mr. Bowe said the permit applicant had proposed a hearing the first week of June, while the petitioners and DEQ had proposed a mid-July date at the earliest.

Mr. Bowe informed the Board that he was available to be the hearing examiner if the Board did not want to hear the case. Mr. Fishbaugh thought the Board should hear the case.

Mr. Dan Hoven, attorney for the permit applicant, requested that if the Board decided not to hear the case, an expedited timeframe be followed. He also suggested that a hearing could take two full days.

Ms. Jennifer Hendricks, attorney for petitioners, said the petitioners didn't have any objections to a hearing directly before the Board. She also suggested that the hearing could take up to three days. Ms. Hendricks was opposed to the June date, because she would be out of the country on a personal matter and the petitioners were opposed to the August date because of a scheduling conflict.

Mr. Rusoff said the Department wasn't taking a position on the permit applicant's request for a hearing before the Board, but that the Department did have concerns about having enough time to prepare its defense to the numerous claims. He was concerned that a June or July hearing date would not allow adequate time.

Discussion took place regarding the 120-day goal for hearing air quality permit appeals and also regarding the proposed schedules. Chairman Russell expressed concern about scheduling and suggested specific dates be set if the Board does decide to hear the case.

Mr. Shanahan suggested June 11 through 13 for the hearing and further suggested moving the regular Board meeting from June 6 to June 13. Chairman Russell suggested the end of the first week in June for the hearing. Mr. Bowe confirmed he would be available those days, as did most of the Board members. Discussion continued regarding various possible dates.

Ms. Brooke MOVED that the Board hear the case. Mr. Shanahan SECONDED the motion. The motion CARRIED with a unanimous VOTE.

Mr. Shanahan MOVED to hear the case on June 4, 5, and 6. Dr. Smith SECONDED the motion. Discussion took place regarding the blanks in the schedule leading up to the hearing date. Mr. Bowe suggested that most of the briefing could be eliminated and that any legal issues could be set forth in prehearing memoranda. He thought the big issue would be discovery.

Ms. Brooke MOVED for the Board to hear the case on June 4, 5 and 6. Mr. Shanahan SECONDED the motion. The motion CARRIED with a unanimous VOTE.

4. In the matter of the request for hearing of Crystal View Estates, Flathead County, under Mont. Code Ann. §76-4-108 (EQ #01-1095) (BER 2003-05 SUB).

Chairman Russell announced that he was recusing himself from this case and appointing Dr. Smith to conduct the proceeding. Mr. Bowe explained that Crystal View Estates filed a motion to join Flathead County and the Flathead City-County Health Department as parties to the case, but that the County was planning to oppose the motion. He agreed that it was appropriate for the Chairman to recuse himself.

Mr. Bowe said he was available to be the hearing examiner in the case. Mr. Shanahan MOVED to APPOINT Tom Bowe to be the hearing examiner and to set the schedule as he deems appropriate. Ms. Brooke SECONDED the motion. The motion CARRIED with a 6-0 VOTE.

D. ACTION ON APPEALS

1. In the matter of Westmoreland Resources, Inc. (WRI) (BER 2002-04 MSUMRA).

Mr. Shanahan MOVED to APPROVE the order and to AUTHORIZE the Chairman to sign the order. Ms. Brooke SECONDED the motion. The motion CARRIED with a unanimous VOTE.

2. In the matter of Derek Brown Construction, Inc. (BER 2002-10 ASB).

Mr. Shanahan MOVED to APPROVE Mr. Bowe's proposed decision and to AUTHORIZE the Chairman to sign the order denying Derek Brown Construction's motion to add parties. Ms. Brooke SECONDED the motion.

3. In the matter of Classical Gas (BER 2002-12 UST).

Mr. Shanahan MOVED to APPROVE the order granting summary judgment in favor of the Department against Classical Gas, and the administrative penalty of \$500 being imposed. Ms. Brooke SECONDED the motion. The motion CARRIED with a unanimous VOTE.

4. In the matter of Sterling Mining Company (BER 2002-01 AQ).

Mr. Rusoff said the Board's original copy now has all the signatures, except for Sterling Mining Company's. He said the company didn't believe they needed to sign it since they weren't a party to the settlement.

Mr. Shanahan MOVED to ACCEPT the settlement stipulation and to AUTHORIZE the Chair to sign the order, which dismisses the contested case with prejudice and orders the parties to comply with the stipulation. Ms. Brooke SECONDED the motion. The motion CARRIED with a unanimous VOTE.

5. In the matter of Malmstrom Air Force Base (BER 2003-02 AQ).

Mr. Bowe thought the settlement corrected some issues with the air permits. Ms. Brooke MOVED to ADOPT the settlement stipulation and to AUTHORIZE the Chair to sign the order dismissing the case with prejudice. Mr. Fishbaugh SECONDED the motion. The motion CARRIED with a unanimous VOTE.

6. In the matter of McHugh Mobile Home Partnership (BER 2003-03 PWS).

Mr. Shanahan MOVED to ACCEPT the settlement and to AUTHORIZE the Chair to sign the order dismissing the case without prejudice. Mr. Fishbaugh SECONDED the motion. The motion CARRIED with a unanimous VOTE.

Mr. Hudson requested that the Forest Service provide an update on the New World Mine cleanup to the Board at its June meeting. The Board requested the presentation be brief and address work plans and budgets for this year.

IV. ADJOURNMENT

Chairman Russell called for a motion to ADJOURN. Mr. Shanahan so MOVED. Ms. Brooke SECONDED the motion. The motion CARRIED with a unanimous VOTE and the meeting ADJOURNED at 4:04 p.m.

Board of Environmental Review March 28, 2003 Minutes Approved:

JOSEPH W. RUSSELL, M.P.H.
CHAIRMAN
BOARD OF ENVIRONMENTAL REVIEW

DATE